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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re A.H. et al., Persons Coming Under the Juvenile Court Law.

SAN FRANCISCO HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ALEXANDER N.,

Defendant and Appellant.

_____/

A139760

San Francisco Super. Ct. Nos. JD113296, JD113296A

Presumed father Alexander N. (father) appeals from the juvenile court's order terminating his parental rights as to A.H. and Z.H. (collectively, daughters) following a Welfare and Institutions Code section 366.26 (.26 hearing).[1] He claims the San Francisco Human Services Agency's (Agency) failure to comply with the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) requires a conditional reversal of the order terminating his parental rights.

[1] Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

We agree. We conditionally reverse the order terminating father's parental rights and remand for the limited purpose of ensuring compliance with the ICWA-related duties of inquiry and notice.

FACTUAL AND PROCEDURAL BACKGROUND

This case has a lengthy history. We provide a brief procedural history and recite only those facts relevant to father's ICWA claim on appeal.

Detention, Jurisdiction, and Disposition

A.H. was born in 2005 and Z.H. was born in 2008. In a previous dependency case (S.F. Super. Ct. Nos. JD083018 & JD083301), Christina H. (mother) reunified with daughters. The case was closed in 2010, "granting the mother full physical and legal custody." Father received reunification services in the previous dependency case, but "was unable to get custody" of daughters.

In 2011, the Agency filed — and later amended — a petition to have daughters declared dependents of the court. In the operative petition, the Agency alleged mother had mental health issues for which she was receiving treatment (§ 300, subd. (b)) and father: (1) was unable to provide proper care, shelter, and supervision for daughters; (2) had several referrals regarding his inability to appropriately care for daughters, which placed them at risk of further harm; (3) had sexually molested his then eight-year-old sister in 1997; and (4) "participated in sex offender therapy for nine months as part of his reunification services in [a] prior San Francisco juvenile dependency case concerning [ ] daughters . . . but his services terminated when the children were reunified with [ ] mother and the case was dismissed with sole legal and physical custody of [ ] daughters to [ ] mother[.]" (§ 300, subd. (b).)

Mother completed a Parental Notification of Indian Status form (JV-020) for each daughter. In both forms, mother indicated she "may have Indian ancestry" in a Cherokee tribe through her "grandfather." Mother and father appeared at the detention hearing, where the court noted "ICWA might apply specifically regarding the Cherokee tribe. So we need to make those inquiries." Counsel for daughters responded, "Your Honor, my understanding is those inquiries were made on the last case. I don't know what the

responsibility is to re-notice the tribes, but there was no ICWA findings in the last case." The Agency offered to "double-check" and the court requested an update at the next hearing. The court detained daughters.

In its disposition report, the Agency summarily stated ICWA did not apply. The Agency recommended denying father family reunification services because he "previously failed to reunify with [daughters] in their first dependency case[ ]" and failed to reunify in another dependency case "where it was substantiated that he physically abused his son who was 5 months old at the time." In an addendum report, the Agency again summarily stated ICWA did not apply. At the January 2012 combined jurisdictional and dispositional hearing, the court declared daughters dependents of the court (§ 300, subd. (b)), determined father waived reunification services, and authorized supervised visitation for him.

Status Review Hearing and Petition to Change Court Order

In a status review report, the Agency recommended setting a .26 hearing. The report stated mother had died, and that ICWA did not apply. At an October 2012 status hearing, the court denied father's section 388 petition (form JV-180) requesting reunification services, suspended his visitation with daughters, determined there was not a substantial probability the children would be returned to father, and set a .26 hearing. This court summarily denied father's writ petition challenging the order setting the .26 hearing. (*A.N. v. Superior Court* (A136800)(order filed Nov. 11, 2012).)

Termination of Father's Parental Rights

In its .26 report, the Agency recommended terminating father's parental rights. It explained father had not visited daughters since August 2012 — several months before the court suspended visits — and one daughter reported being "happy in not seeing her father." The Agency described an incident raising a concern that father might try to abduct daughters. The Agency opined daughters were adoptable and "an adoptive home is being actively recruited." The Agency also summarily stated ICWA did not apply.

In a supplemental report, the Agency again recommended terminating father's parental rights and noted ICWA did not apply. The Agency reported daughters had been

placed in a prospective adoptive home. At the .26 hearing, father's counsel argued father was "opposed to the termination of his parental rights" but did not mention ICWA. At the conclusion of the .26 hearing, the court terminated father's parental rights. It does not appear the court made findings regarding ICWA.

DISCUSSION

Father contends the order terminating his parental rights must be conditionally reversed because the Agency did not comply with ICWA notice requirements. His claim is cognizable on appeal notwithstanding his failure to raise the issue in the juvenile court. (*In re Z.N.* (2009) 181 Cal.App.4th 282, 296; *In re J.T.* (2007) 154 Cal.App.4th 986, 991.) The purpose of ICWA is well-established and we need not restate it here. (See 25 U.S.C. § 1902; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

ICWA requires notice "where the [juvenile] court knows or has reason to know that an Indian child is involved[.]" (25 U.S.C. § 1912(a); see § 224.2; Cal. Rules of Court, rule 5.481(b).) On her JV-020 forms, mother indicated she "may have Indian ancestry" in the Cherokee tribe through her "grandfather." This information triggered the Agency's duty to inquire further and to provide notice. Several cases have held that only a suggestion of Indian ancestry triggers the notice requirement. (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1198; *In re Damian C.* (2009) 178 Cal.App.4th 192, 199 [information that minor's great-grandfather "was Yaqui or Navajo"].)

The Agency claims the court did not have "reason to know" daughters "were Indian children." According to the Agency, "[w]hen the court inquired at the detention hearing whether the girls had any connection to the Cherokee tribe, the girls' attorney answered that ICWA had already been found inapplicable in the prior dependency case. Neither parents' counsel objected. The court left the matter open . . . the Agency later confirmed that ICWA did not apply . . . and the court went forward with the proceedings. This reflects an implied finding that ICWA did not apply."

We are not persuaded by the Agency's characterization of counsel for daughters' statement. At the detention hearing, daughters' counsel stated, "there was no ICWA findings in the last case." This statement could be interpreted to mean the court in the

previous dependency case had determined ICWA did not apply, but it could also be interpreted to mean the court had not made a finding with respect to any ICWA issues, including whether ICWA notice had been given. The record in daughters' previous dependency case is not before us.[2] As a result, we are unable to determine what information about Indian heritage was provided by mother or others in that case, what tribes, if any, were noticed, whether any such notices were proper and adequate, whether any tribes responded to notices, and how the previous court ruled on the ICWA issue. This lack of evidence distinguishes this case from the cases upon which the Agency relies. (Cf. *In re E.W.* (2009) 170 Cal.App.4th 396, 399-400 [ICWA notices' failure to include information about one of two children was harmless; the children had same father and tribes determined child identified was not an Indian child]; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430 [record contained no indication of any Indian ancestry]).

Here, there is no evidence in the record that either the duty to inquire further or to provide notice was discharged in this case. Under these circumstances, it is not reasonable to infer the Agency satisfied its ICWA-related duties. We therefore conditionally reverse the order terminating father's parental rights and remand for compliance with the applicable inquiry and notice requirements. (See *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1432-1433, 1437-1438; *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467.) Like other courts, "'[w]e are growing weary of appeals in which the only error is [Agency's] failure to comply with [ ] ICWA. [Citation.] Remand for the limited purpose of ICWA compliance is all too common. [Citation.] [ ] ICWA's requirements are not new. Yet the prevalence of inadequate notice remains disturbingly high.'" (*In re Christian P.* (2012) 208 Cal.App.4th 437, 452, quoting *Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410.)

DISPOSITION

The order terminating father's parental rights is conditionally reversed and the matter is remanded to the juvenile court with directions to determine whether the ICWA

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[2] For purposes of our review, "if it is not in the record, it did not happen[.]" (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

issue was adjudicated in the prior dependency proceeding, San Francisco Superior Court case numbers JD083018 and JD083301. If there was a determination in the prior proceeding that ICWA notice was given and ICWA did not apply, the court shall reinstate the order terminating father's parental rights in this case.

If the ICWA issue was not adjudicated in the prior proceeding, the court is ordered to direct the Agency to inquire into mother's Indian heritage, and to provide all required notices. If, after proper inquiry and notice, no tribe determines A.H. or Z.H. is an Indian child within the meaning of ICWA, the court shall reinstate the order terminating father's parental rights. If either A.H. or Z.H. is determined to be an Indian child within the meaning of ICWA, the court shall proceed in compliance with ICWA and related state requirements.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.